HARRIMAN *v.* INTERSTATE COMMERCE COMMISSION.
KAHN *v.* INTERSTATE COMMERCE COMMISSION.
INTERSTATE COMMERCE COMMISSION *v.* HARRIMAN.

APPEALS FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

Nos. 315, 316, 317. Argued November 3, 4, 1908.—Decided December 14, 1908.

The primary purpose of the Interstate Commerce Act is to regulate interstate business of carriers, and the secondary purpose, that for which the commission was established, to enforce the regulations enacted by it, and the power to require testimony is limited, as is usual in English-speaking countries, to investigations concerning a specific breach of the existing law; this power is not extended to mere investigations by provisions in any of the amendatory acts in regard to annual reports of interstate carriers, or of the commission, or for the purpose of recommending legislation.

Quære whether Congress has unlimited power to compel testimony in regard to subjects which do not concern direct breaches of law, and whether, and to what extent, it can delegate such power.

of privacy is necessary—those where the investigations concern a specific breach of the law.

That this is the true view appears, we think, sufficiently from the original form of § 14. That section made it the duty of the commission, "whenever an investigation shall be made," to make a report in writing, which was to "include the findings of fact upon which the conclusions of the Commission are based, together with its recommendation as to what reparation, if any, should be made by the common carrier to any party or parties who may be found to have been injured; and the findings so made shall thereafter, in all judicial proceedings, be deemed *prima facie* evidence as to each and every fact found." As this applied, in terms, to all investigations, it is plain that at that time there was no thought of allowing witnesses to be summoned except in connection with a complaint for contraventions of the act, such as the commission was directed to "investigate" by § 13, or in connection with an inquiry instituted by the commission, authorized by the same section, "in the same manner and to the same effect as though complaint had been made." Obviously such an inquiry is limited to matters that might have been the object of a complaint.

The plain limit to the authority to institute an inquiry given by § 13, and the duty to make a report with findings of facts, etc., in the section next following, with hardly a word between, hang together, and show the purposes for which it was intended that witnesses should be summoned. They quite exclude the inference of broader power from the general words in § 12, as to inquiring into the management of the business of common carriers, subject to the provisions of the act, the commission keeping itself informed, etc. They equally exclude such an inference from § 21, the other section on which most reliance is placed. That, as it now stands, requires an annual report, containing "such information and data collected by the Commission as may be considered of value in the determination of questions connected with the regulation of commerce, together with such recommendations as to additional legislation

relating thereto as the Commission may deem necessary." Act of March 2, 1889, c. 382, § 8, 25 Stat. 855, 862.

It is true that in the latest amendment of § 14, findings of fact are required only in case damages are awarded. Act of June 29, 1906, c. 3591, § 3, 34 Stat. 584, 589. But there is no change sufficient to affect the meaning of the words in § 12, as already fixed. If by virtue of § 21 the power exists to summon witnesses for the purpose of recommending legislation, we hardly see why, under the same section, it should not extend to summoning them for the still vaguer reason that their testimony might furnish data considered by the commission of value in the determination of questions connected with the regulation of commerce. If we did not think, as we do, that the act clearly showed that the power to compel the attendance of witnesses was to be exercised only in connection with the *quasi*-judicial duties of the commission, we still should be unable to suppose that such an unprecedented grant was to be drawn from the counsels of perfection that have been quoted from §§ 12 and 21. We could not believe on the strength of other than explicit and unmistakable words that such autocratic power was given for any less specific object of inquiry than a breach of existing law, in which, and in which alone, as we have said, there is any need that personal matters should be revealed.

In §§ 15 and 16 are further provisions for the enforcement of the act, not otherwise material than as showing the main purpose that Congress had in mind. The only other section that is thought to sustain the argument for the commission is § 20, amended by act of June 29, 1906, c. 3591, § 7, 34 Stat. 584, 593. This authorizes the commission to require annual reports from all the carriers concerned, with details of what is to be shown, to which the commission may add in certain particulars, and further "to require from such carriers specific answers to all questions upon which the Commission may need information." The commission may require certain other reports, and is to have access to all accounts, records and memoranda. The section now deals at length with this matter and how ac-

counts shall be kept and the like. It seems to us plain that it is directed solely to accounts and returns, and is imposing a duty on the common carrier only from whom the returns come.

All that we are considering is the power under the act to regulate commerce and its amendments to extort evidence from a witness by compulsion. What reports or investigations the commission may make without that aid but with the help of such returns or special reports as it may require from the carrier, we need not decide. Upon the point before us we should infer from the later action of Congress with regard to its resolution of March 7, 1906, 34 Stat. 823, directing the commission to investigate and report as to railroad discrimination and monopolies in coal and oil, that it took the same view that we do. For it thought it advisable to amend that resolution on March 21 by adding a section giving the commission the same power it then had to compel the attendance of witnesses in the investigation ordered. 34 Stat. 824. The mention of the power then possessed obviously is intended simply to define the nature and extent of the power by reference to § 12 of the original act. The passage of the amendment indicates that without it the power would be wanting. The case is not affected by the provision of § 9 of the act of June 29, 1906, c. 3591, § 9, 34 Stat. 595, extending the former acts relating to the attendance of witnesses and the compelling of testimony to "all proceedings and hearings under this Act." If we felt more hesitation than we do, we still should feel bound to construe the statute not merely so as to sustain its constitutionality but so as to avoid a succession of constitutional doubts, so far as candor permits. *Knights Templar & Indemnity Co.* v. *Jarman*, 187 U. S. 197, 205.

Order in 315 *and* 316 *reversed.*
Order in 317 *affirmed.*
Petition denied.

MR. JUSTICE MOODY, not having been present at the argument, took no part in the decision.

MR. JUSTICE DAY, dissenting.

I am constrained to dissent from the opinion of the court in this case. It seems to me that too narrow a construction has been given to the act of Congress conferring power upon the Interstate Commerce Commission to conduct investigations into the affairs of corporations engaged in interstate commerce.

The court in the prevailing opinion has not placed its decision upon the want of power in Congress to legislate concerning the subject-matter of investigation in this case. The decision is based wholly upon the construction of the act of Congress, and as I am unable to concur in the view taken in the opinion, I will state the grounds upon which my dissent rests.

The reports of committees which accompanied the enactment of the Interstate Commerce Law, in its original form, show that importance was attached to the power conferred upon the commission to make investigations as well as to make orders relating to specific complaints as to practices affecting the conduct of interstate commerce and the instrumentalities by which the same is carried on. It was to have a power of investigation, such as had been conferred upon similar bodies in the States and in the English acts regulating the subject, with a view to eliciting information important to be had, in order to lay the basis for intelligent and efficient action in the legislative branch of the Government to which the Constitution has delegated power to regulate commerce among the States and with foreign nations.

In speaking of this power, Judge Cooley, the eminent chairman of the commission, in its first annual report, said:

"This is a very important provision and the commission will no doubt have frequent occasion to take action under it. It will not hesitate to do so in any case in which a mischief of public importance is thought to exist, and which is not likely to be brought to its attention on complaint of a private prosecutor."

In numerous instances investigations have been conducted by the commission having in view the exercise of its authority to afford information as to the manner and methods in which corporations engaged in interstate commerce are conducting their business. These investigations have been undertaken upon the initiative of the commission; witnesses have been subpœnaed; and testimony has been taken without objection from those interested that the power of the commission conferred by the acts of Congress had been exceeded. While these considerations are not determinative of the extent of the powers conferred in the act, they are suggestive of the practical construction which those interested have put upon it.

The act itself makes provision for two kinds of investigation, the one under § 12 upon the initiative of the commission without written complaint; the other under § 13, where investigation and orders are made upon complaint.

We are concerned in this case with an investigation undertaken upon the initiative of the commission under § 12 of the act. That section, so far as pertinent, provides:

"That the commission hereby created shall have authority to inquire into the management of the business of all common carriers subject to the provisions of this act, and shall keep itself informed as to the manner and method in which the same is conducted, and shall have the right to obtain from such common carriers full and complete information necessary to enable the commission to perform the duties and carry out the objects for which it was created; and the commission is hereby authorized and required to execute and enforce the provisions of this act; and, upon the request of the commission, it shall be the duty of any district attorney of the United States to whom the commission may apply to institute in the proper court and to prosecute under the direction of the Attorney General of the United States all necessary proceedings for the enforcement of the provisions of this act and for the punishment of all violations thereof, and the costs and expenses of such prosecution shall be paid out of the appropriation for the expenses

of the courts of the United States; and for the purposes of this act the commission shall have power to require, by subpœna, the attendance and testimony of witnesses and the production of all books, papers, tariffs, contracts, agreements, and documents relating to any matter under investigation.

"Such attendance of witnesses, and the production of such documentary evidence, may be required from any place in the United States, at any designated place of hearing. And in case of disobedience to a subpœna the commission, or any party to a proceeding before the commission, may invoke the aid of any court of the United States in requiring the attendance and testimony of witnesses and the production of books, papers, and documents under the provisions of this section."

The plain reading of this section is that for the purposes of the act the commission shall have power to require, by subpœna, the attendance and testimony of witnesses, and the production of books, papers, contracts, tariffs, agreements, and documents relating to any matter under investigation. Notwithstanding the broad language used by Congress, it is now held that the power of the commission to require testimony embraces only subjects stated in complaints for the violation of the act, or investigations by the commission upon matters which might have been the subject of complaint. I am unable to follow the reasoning which thus cuts down the expressed words of the act, which enables the commission to require testimony for all purposes of the act. The complaints under the act may relate to unreasonable rates, to discriminating practices, to the management of the affairs of the carrier as involved in or connected with the conduct of interstate commerce, to the relations of interstate carriers with each other, and the like matters, directly affecting corporations and individuals engaged in interstate commerce. These things are within the purposes of the act, but no more so, in my judgment, than the declared purpose of the act to endow the commission with investigating powers, having in view the ascertainment of the manner in which interstate commerce business is con-

ducted and managed, with a view to intelligent action upon these important subjects.

For the purposes of the act this power to require the attendance of witnesses and the production of books, papers, tariffs, contracts, etc., relating to any matter under investigation, is specifically conferred by Congress. To make the act read that the power shall be conferred only for the purposes of laying the ground for redress of specific complaints, or things which might be the subject-matter of complaints, narrows its provisions from the broad power conferred in the language used by Congress to powers limited to the execution of only a part of the act. It seems to me that the restricted construction given in the opinion has the effect to entirely reform the act of Congress, substituting for it, by judicial construction, a much narrower act than Congress intended to pass, and did, in fact, pass.

In § 12, which requires the district attorneys under the direction of the Attorney General to take all necessary proceedings for the enforcement of the act, and empowers the commission for the purposes of the act to issue subpœnas and require the production of books, papers, etc., there is in terms conferred, as the basis of this judicial action and this power to summon witnesses, authority to inquire into the management of the business of corporations subject to the provisions of the act, in order that the commission may keep itself informed as to the manner and methods in which the same is conducted, and to obtain from common carriers thus engaged full and complete information to enable the commission to prevent bad practices and to perform the duties and carry out the objects for which it was created.

Nor are the purposes of the act for which the power to subpœna witnesses, require the production of books, papers, etc., alone defined in § 12. In § 20 of the act, in order to enable the commission to make its reports, it is authorized to require from common carriers specific answers upon all questions upon which the commission may need information, such reports to

contain a showing of the amount of the capital stock, the amount paid therefor, the manner of payment for the same, etc., and § 21 of the act requires the commission to make an annual report which shall contain such information and data collected by the commission as may be considered of value in the determination of questions concerning the regulation of commerce, together with such recommendation as to additional legislation relating thereto as the commission may deem necessary. These things are "purposes of the act" no less than the hearing of complaints and making orders touching the same. For all these purposes § 12 conferred the power which was sought to be exercised in this case. That inquiries might take a wide range is shown in the acts of Congress giving immunity to persons required to testify, and providing that no person shall be excused from attendance and testifying, or from producing books, papers, etc., before the Interstate Commerce Commission for the reason that his answers or the production of such testimony may tend to criminate him, and granting immunity from prosecution because of such compulsory testimony.

The function of investigation which Congress has conferred upon the Interstate Commerce Commission is one of great importance, and while of course it can only be exercised within the constitutional limitations which protect the individual from unreasonable searches and seizures and unconstitutional invasions of liberty, the act should not be construed so narrowly as to defeat its purposes.

In the case of *Interstate Commerce Commission* v. *Brimson*, 154 U. S. 447, 474, this court had under consideration the provisions of § 12, authorizing the Interstate Commerce Commission to conduct an investigation upon its own motion, and in that case this court said:

"An adjudication that Congress could not establish an administrative body with authority to investigate the subject of interstate commerce, and with power to call witnesses before it, and to require the production of books, documents and

papers relating to that subject, would go far towards defeating the object for which the people of the United States placed commerce among the States under national control. All must recognize the fact that the full information necessary as a basis of intelligent legislation by Congress from time to time upon the subject of interstate commerce cannot be obtained, nor can the rules established for the regulation of such commerce be efficiently enforced otherwise than through the instrumentality of an administrative body representing the whole country, always watchful of the general interests, and charged with the duty not only of obtaining the required information, but of compelling by all lawful methods obedience to such rules."

And in *Interstate Commerce Commission* v. *Railway*, 167 U. S. 506, this court said:

"It [the commission] is charged with the general duty of inquiring as to the management of the business of railroad companies, and to keep itself informed as to the manner in which the same is conducted, and has the right to compel complete and full information as to the manner in which such carriers are transacting their business."

In the case of *Texas & Pacific Ry. Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 438, this court said:

"The commission was endowed with plenary administrative power to supervise the conduct of carriers, to investigate their affairs, their accounts, and their methods of dealing, and generally to enforce the provisions of the act."

In the case last cited it was held that a rate filed with the Interstate Commerce Commission could only be attacked for unreasonableness by a proceeding before the commission, with a direct view to a change in the rate. The power thus invested in the commission, no less than the power conferred in this case, affected shippers from Maine to Texas, and required a shipper making complaint against a common carrier for carriage in a remote part of the country to obtain redress for unreasonable rates only by a proceeding before the Interstate Commerce Commission, which ordinarily sits in the capital at

Washington. Legislative power vested in Congress over interstate commerce embraces the whole country, and while it may be extremely inconvenient to compel the attendance of witnesses and the production of the papers, etc., throughout a domain so large as ours, that consideration does not detract from the power of Congress over the subject-matter.

Assuming, for the purposes of this case and the construction of the statute, that the relations of directors in a corporation engaged in interstate commerce to the sales of stock to such corporation may be the subject of inquiry when Congress confers such power upon the commission, I think that in this act Congress has conferred such power. If such is the proper construction of the act, it follows that the commission had a right to propound the questions which the Circuit Court directed to be answered. In my view the judgment of the Circuit Court should be affirmed.

MR. JUSTICE HARLAN and MR. JUSTICE MCKENNA concur in this dissent.

MR. JUSTICE HARLAN also dissents in No. 317.